

Karma M. Giulianelli (SBN 184175)  
karma.giulianelli@bartlitbeck.com

**BARTLIT BECK LLP**

1801 Wewetta St., Suite 1200  
Denver, Colorado 80202  
Telephone: (303) 592-3100

Hae Sung Nam (*pro hac vice*)  
hnam@kaplanfox.com

**KAPLAN FOX & KILSHEIMER LLP**

850 Third Avenue  
New York, NY 10022  
Telephone: (212) 687-1980

*Co-Lead Counsel for the Proposed Class in In re  
Google Play Consumer Antitrust Litigation*

Paul J. Riehle (SBN 115199)  
paul.riehle@faegredrinker.com

**FAEGRE DRINKER BIDDLE & REATH  
LLP**

Four Embarcadero Center, 27th Floor  
San Francisco, CA 94111  
Telephone: (415) 591-7500

Christine A. Varney (*pro hac vice*)  
cvarney@cravath.com

**CRAVATH, SWAINE & MOORE LLP**

825 Eighth Avenue  
New York, New York 10019  
Telephone: (212) 474-1000

*Counsel for Plaintiff Epic Games, Inc. in Epic  
Games, Inc. v. Google LLC et al.*

Brendan P. Glackin (SBN 199643)

Lauren M. Weinstein (*pro hac vice*)

bglackin@agutah.gov

lweinstein@agutah.gov

**OFFICE OF THE UTAH ATTORNEY  
GENERAL**

160 E 300 S, 5th Floor  
PO Box 140872  
Salt Lake City, UT 84114-0872  
Telephone: (801) 366-0260

*Counsel for the Plaintiff States*

Douglas J. Dixon (SBN 275389)

ddixon@hueston.com

**HUESTON HENNIGAN LLP**

620 Newport Center Drive, Suite 1300  
Newport Beach, CA 92660  
Telephone: (949) 229-8640

*Counsel for Match Group, LLC, et al.*

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

**IN RE GOOGLE PLAY STORE  
ANTITRUST LITIGATION**

THIS DOCUMENT RELATES TO:

*Epic Games Inc. v. Google LLC et al.*, Case  
No. 3:20-cv-05671-JD

*In re Google Play Consumer Antitrust  
Litigation*, Case No. 3:20-cv-05761-JD

*State of Utah et al. v. Google LLC et al.*,  
Case No. 3:21-cv-05227-JD

*Match Group, LLC et al. v. Google LLC et  
al.*, Case No. 3:22-cv-02746-JD

Case No. 3:21-md-02981-JD

**PLAINTIFFS' NOTICE OF  
OBJECTION RELATED TO RULE 37  
SANCTIONS HEARING**

Judge: Hon. James Donato

Plaintiff Epic Games, Inc., Consumer Plaintiffs, State Plaintiffs and Plaintiffs Match Group, LLC et al., (collectively, “Plaintiffs”) write to apprise the Court of an evidentiary issue that could arise during the January 12, 2023 evidentiary hearing. Specifically, Plaintiffs have repeatedly asked Google to produce the litigation hold notice it issued in this litigation and to disclose its preservation efforts, but Google has steadfastly refused, claiming privilege. Google has also instructed witnesses not to answer questions about the instructions they were given to preserve relevant documents. Now, on the eve of an evidentiary hearing concerning its spoliation of evidence, Google notified Plaintiffs in its pre-hearing disclosures that it intends to introduce testimony on the *same subject matter* that it has steadfastly refused to disclose: Google’s standard practices relating to litigation holds.<sup>1</sup> See ALS Decl. at Ex. A, 2023/1/9 Letter from B. Rocca. This is a classic case of using privilege as both a sword and a shield. Plaintiffs respectfully request that the Court preclude Google from introducing any such evidence.

### **BACKGROUND**

On December 20, 2021, Plaintiffs issued a document preservation interrogatory concerning the “specific actions” the recipients of its litigation hold were instructed to take. See Dkt. No. 349-1 at Ex. 2 (Google’s Responses and Objections to Interrogatory No. 1). On January 14, 2022, Google responded, refusing to answer the interrogatory on privilege grounds and demanding that “all parties . . . exchange specified legal hold instructions” subject to a non-waiver agreement. *Id.* Plaintiffs refused Google’s demand because Plaintiffs’ litigation holds were not at issue; no threshold showing of spoliation had been made as to any party to this litigation except for Google. *City of Colton v. Am. Promotional Events, Inc.*, 2011 WL 13223880, at \*5-6 (C.D. Cal. Nov. 22, 2011).

During depositions, Plaintiffs sought to investigate the extent of Google’s spoliation of evidence and any efforts Google made to preserve evidence. Plaintiffs specifically asked yes or no questions about Google’s litigation hold, including as to potential instructions to the witnesses to turn their Google Chat history on. But Google repeatedly instructed its witnesses not to answer

---

<sup>1</sup> Plaintiffs met and conferred with Google on January 11, 2023 and Google stated that it intended to raise this issue during the hearing.

1 such questions, claiming privilege. *See, e.g.*, Dkt. No. 258 at Ex. 10 (Wang Tr. at 194:16-196:10);  
 2 *id.* at Ex. 8 (Kolotorous Tr. at 483:2-16).

3 Plaintiffs filed their Notice of Motion and Motion for Sanctions on October 13, 2022. MDL  
 4 Dkt. No. 349. The Court ordered an evidentiary hearing to occur on January 12, 2023 to hear  
 5 evidence regarding “the use and operation of the electronic chat system, including storage and  
 6 deletion policies, guidelines for chat content, and examples of typical chat communications.” MDL  
 7 Dkt. No. 375. To prepare for the hearing, Plaintiffs again asked Google for its litigation hold and  
 8 preservation instructions, and reserved rights to “move to exclude any testimony from Google  
 9 witnesses on the steps they took to preserve Google Chats beyond what Google has disclosed in  
 10 its interrogatory responses or produced documents.” *See* ALS Decl. at Ex. B, 2022/11/19 Letter  
 11 from K. Giulianelli. Google rejected Plaintiffs’ request, again demanding Plaintiffs’ litigation  
 12 holds and preservation instructions. *See* ALS Decl. at Ex. C 2022/11/30 Letter from G. Pomerantz.

13 In preparation for this hearing, the Court ordered Google to provide “a written summary of  
 14 witness Lopez’s anticipated testimony.” MDL Dkt. No. 399. In disregard of the Court’s order,  
 15 Google provided only a single paragraph setting forth the general topics of Mr. Lopez’s anticipated  
 16 testimony. Plaintiffs demanded a summary compliant with the Court’s order. On the afternoon of  
 17 January 9 – three days before the hearing – Google disclosed for the first time that Mr. Lopez  
 18 would be testifying regarding “Google’s general approach and standard practice regarding  
 19 retention of Chat messages *subject to a legal hold*.” ALS Decl. at Ex. A, 2023/1/9 Letter from B.  
 20 Rocca (emphasis added).

### 21 ARGUMENT

22 “The privilege which protects attorney-client communications may not be used both as a  
 23 sword and a shield.” *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992). The  
 24 same is true of the work product doctrine. *In re Columbia/HCA Healthcare Corp. Billing Pracs.*  
 25 *Litig.*, 293 F.3d 289, 307 (6th Cir. 2002). “In practical terms, this means that parties in litigation  
 26 may not abuse the privilege by asserting claims the opposing party cannot adequately dispute  
 27 unless it has access to the privileged materials.” *Bittaker v. Woodford*, 331 F.3d 715, 719 (9th Cir.  
 28 2003); *see, e.g., U.S. ex rel. Baker v. Community Health Systems, Inc.*, 2012 WL 12294414, at \*2

(D.N.M. Sept. 26, 2012) (ordering production of litigation hold documents after government submitted declaration regarding adequacy of litigation hold). A contrary rule would defy basic notions of fairness.

Google's conduct here is a textbook case of sword and shield. In discovery, Google refused to produce its litigation hold and instructed witnesses not to answer questions about preservation instructions they received. Now, Google claims it will be attempting to use that assertedly privileged litigation hold and preservation instructions as a sword to justify the purported reasonableness of Google's systematic, automated deletion of Chat messages.

Plaintiffs respectfully request that the Court preclude Google from eliciting testimony or introducing any new evidence concerning its preservation instructions (beyond what Google has already disclosed in its interrogatory responses, deposition testimony, or produced documents).

Dated: January 11, 2023

BARTLIT BECK LLP  
Karma M. Giulianelli

KAPLAN FOX & KILSHEIMER LLP  
Hae Sung Nam

Respectfully submitted,

By: /s/ Karma M. Giulianelli  
Karma M. Giulianelli

*Co-Lead Counsel for the Proposed Class in In re Google Play Consumer Antitrust Litigation*

PRITZKER LEVINE LLP  
Elizabeth C. Pritzker

Respectfully submitted,

By: /s/ Elizabeth C. Pritzker  
Elizabeth C. Pritzker

*Liaison Counsel for the Proposed Class in In re Google Play Consumer Antitrust Litigation*

CRAVATH, SWAINE & MOORE LLP

Christine Varney (*pro hac vice*)

Gary A. Bornstein (*pro hac vice*)

Timothy G. Cameron (*pro hac vice*)

Yonatan Even (*pro hac vice*)

Lauren A. Moskowitz (*pro hac vice*)

Justin C. Clarke (*pro hac vice*)

Michael J. Zaken (*pro hac vice*)

M. Brent Byars (*pro hac vice*)

FAEGRE DRINKER BIDDLE & REATH LLP

Paul J. Riehle (SBN 115199)

Respectfully submitted,

By: /s/ Lauren A. Moskowitz

Lauren A. Moskowitz

*Counsel for Plaintiff Epic Games, Inc.*

OFFICE OF THE UTAH ATTORNEY GENERAL

Brendan P. Glackin

Lauren M. Weinstein

Respectfully submitted,

By: /s/ Lauren M. Weinstein

Lauren M. Weinstein

*Counsel for the Plaintiff States*

HUESTON HENNIGAN LLP

Douglas J. Dixon

Christine Woodin

Joseph A. Reiter

Respectfully submitted,

By: /s/ Douglas J. Dixon

Douglas J. Dixon

*Counsel for Plaintiffs Match Group, LLC et al.*

**E-FILING ATTESTATION**

I, Jessica V. Sutton, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that each of the signatories identified above has concurred in this filing.

/s/ Jessica V. Sutton  
Jessica V. Sutton